No. 2471

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a corporation,
Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error in the United States District Court for the Eastern District of ~~Oregon~~ Washington Northern Division.

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OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a corporation,
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STATEMENT OF THE CASE.

By an Act approved March 4, 1907, effective one year thereafter, commonly known as the Hours of Service Act, the Congress of the United States, declared it unlawful for any common carrier by railroad, engaged in interstate commerce, to require or permit any employe actively engaged in or connected with the movement of any train, to be or remain on duty for a longer period than certain designated hours. The Act charges the Interstate Commerce Commission with the duty of enforcing its provisions,

"And all powers granted to the Interstate Commerce Commission, are hereby extended to it in the execution of this Act." (Section 4.)

The penalty prescribed is a sum not exceeding Five Hundred ($500.00) Dollars, and no action shall be brought for its recovery after the expiration of one year after the date of such violation.

Without stating the history of the legislation, let it be recalled that the Congress, by the act of June 18, 1910, (Chap. 309, 36 Stat. 556), amended Section 20 of the Act to regulate commerce, as the same existed as

amended June 29, 1906 (43 Stat. 584) and February 25, 1909 (35 Stat. 648), which said Acts finally define the "granted powers" of the Interstate Commerce Commission, to which Section 4 of the Hours of Service Act refers.

By Section 20 of the Act to regulate commerce, as amended, the Interstate Commerce Commission is clothed with powers of search and seizure, together with the right to require information in the remotest detail as to such common carriers. Among other things, the Commission has power as follows:

(a) To require annual reports.

(b) To prescribe manner in which such reports shall be made.

(c) To require specific answers to all questions upon which the Commission may need information.

(d) To obtain information as to rates, regulations, agreements, arrangements or contracts.

(e) To require compliance within a definite time.

(f) To prescribe a uniform system of accounts as near as may be.

(g) To require that reports shall be made out under oath.

(h) To require monthly reports of earnings and expenses.

(i) To file periodical or special, or both periodical and special reports.

The statute also prescribes what these reports shall contain. For example, the annual report is required to contain information complete and in great detail concerning fifteen or more general subjects relating to carriers, among which are the following:

1. The amount of capital stock.
2. The amounts paid therefor.
3. The manner of payment.
4. The dividends paid.
5. The surplus fund, if any.
6. The number of stockholders.
7. The funded and floating debt and interest paid thereon.
8. The cost and value of the property.
9. The number of employees and salaries.
10. The accidents to persons and property and the causes therefor.
11. The amount expended for improvements, how expended, and the character of the same.
12. The earnings and receipts from each branch of the business and from all sources.
13. The operating and other expenses.
14. The balance of profit and loss.
15. A complete exhibit of financial operations, including annual balance sheet.
16. Any statistics for twelve months as may be required by the Commission.

Moreover, this statute, Section 20, also requires the periodical or special report to contain:

1. A report of the earnings and expenses per month.
2. Information concerning any matters about which the Commission is authorized or required, by this or *any other law to inquire,* or to keep itself informed, or *which it is required to enforce.*

Section 4 of the Hours of Service Act, heretofore referred to, extends these powers to the Interstate Com-

merce Commission in the enforcement of the provisions of that Act.

Baltimore & Ohio Ry. Co. v. I. C. C., 221 U. S. 612.

Section 20 of the Act to regulate commerce contains a penalty clause as follows:

"1-a. If any carrier . . . shall fail to make and file said annual reports within the time limit, or

(b) Shall fail to make specific answer to any question authorized by the provisions of this section, within thirty days from the time it is lawfully required so to do, *such party shall forfeit to the United States One Hundred Dollars for each day it shall continue to be in default with respect thereto.*

2. If any carrier shall fail to make any such periodical or special report within the time fixed by the Commission it shall be subject *to the forfeitures last above provided.*"

Before stating the facts of the case at bar, it seems proper that we ascertain the limits and the confines of the statute in question.

It will be noted that the forfeitures above authorized and the contingency under which they arise, are the same in each case, and are for a failure:

(a) To file said annual report, or
(b) To make specific answers to any question, or
(c) To file any such periodical report,

within a limited time in the act, or in the Commission's order stated.

It is further obviously clear and plainly apparent that the statute does not penalize, by forfeiture, any carrier who, within the time limited, files the annual or periodical report, or made answers to the Interstate Commerce Commission's question; but whose reports,

annual or periodical, contains inadvertent errors or omission, rectifiable upon notice, or whose answers to the Interstate Commerce Commission's legally authorized questions, are not as specific as the Commission may desire the same to be. Or to state the proposition differently, the statute does not penalize a carrier in omitting from such report, annual or periodical, some of the information called for therein, nor in substantially, *but not absolutely,* making specific answers to any authorized questions of the Interstate Commerce Commission.

And, moveover, applying the construction illustrated and contended for here to the case at bar, the facts of which we will presently state, the statute does not penalize a carrier if it, "shall omit to specify in any such report it files, any instance of excessive service required to be reported therein." In other words, it is *failure to file a report,* which is the offense and not the *omission from a report filed in good faith and with an honest attempt to comply with the law, an instance or item which should have been included therein, or a mistake in the information which the report contains.*

N. P. Ry. Co. v. U. S., 213 Fed. 162, 168.
U. S. v. Four Hundred Twenty Dollars (D. C.), 162 Fed. 803, 804.
Bonnell v. Griswold, 80 N. Y. 128, 132, 133.
Pier v. Hanmore, 86 N. Y. 95, 100.
Matthews v. Patterson, 16 Colo. 215; 26 Pac. 812, 813.

COMMERCE COMMISSION EXERCISES POWER.

Under the authority granted, the Interstate Commerce Commission on June 28, 1911, made and entered an order (Transcript folio 30), requiring a periodical report from all carriers subject to the hours of service act. This order contains two clauses:

(a) The duty to report within thirty days after each month, under oath, all instances where employees, subject to the act, have been on duty for a longer period than that provided for in said act, and

(b) The duty to use the forms provided and to follow the instructions therein set forth.

A perusal of this order will convince the Court that the first clause thereof cannot be complied with, but by using the forms and following the instructions contained in the second clause. The use of any other forms would not be a compliance with the two clauses of the order, and obviously the failure to use some other forms would not be included within a charge of having failed to use these forms in complying with the two clauses of the order.

THE CASE AT BAR.

On August 4, 1913, the Government filed its complaint in the Court below for the purpose of recovering the sum of Three Thousand ($3000.00) Dollars upon thirty causes of action, each for the recovery of One Hundred Dollars. The plaintiff in error is alleged to have violated the order of the Interstate Commerce Com-

mission above referred to, made on June 28, 1911, in pursuance of Section 20 of the Act to regulate commerce, as amended. The Government alleges (folio 3) that defendant, "having theretofore failed to make and file with said Commission in any form whatsoever, a report of all the instances wherein its employees, subject to said 'act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,' approved March 4, 1907, were on duty during the month of March, 1913, for a longer period than that provided in said act, and did on the first day of May, 1913, continue to be in default with respect thereto."

The Government further alleges that the plaintiff in error did fail to make and file with the Commission any report of the instances wherein one B. G. Bishop, a telegraph operator, was on duty for a longer period than that provided in the act. Said default is alleged also to have continued from the second day of May, 1913, to the 17th day of May, 1913, both dates inclusive and intervening Sundays excepted, and from the first day of July, 1913, to the 18th day of July, 1913, both dates inclusive and Fourth of July and intervening Sundays excepted.

THE ANSWER.

The plaintiff in error, for answer to these thirty causes of action, denied each and every allegation contained therein, except that it does admit that it was a common carrier engaged in Interstate Commerce by railroad in the State of Washington, and in the judicial

district named, and further excepting that it did not report operator Bishop's over-service for the times mentioned in those thirty causes of action, nor prior thereto.

ISSUES.

It will thus be seen, therefore, that the existence of the alleged order of June 28, 1911, is denied, as is also the claim that plaintiff in error failed to make and file with the Commission in any form whatsoever, a report of the instances of over-service in violation of the Hours of Service Act. While the omission of Mr. Bishop's name, which the lower court found was omitted from the list of delinquencies "by inadvertence or mistake" (Transcript, folio 14), is admitted in the pleadings.

EVIDENCE.

The case was tried before the court, a jury being waived (folio 9), upon a stipulation of facts (folio 7, 18); the admission of the pleadings; certified copies of plaintiff in error's Hours of Service Report for the months of March and May, 1913, which said report for the month of March, 1913, was received by the Interstate Commerce Commission, April 21, 1913, showing ninety employees on duty for that month for a period longer than that provided in said act, but in which the name of B. G. Bishop does not appear, and whose name and excessive service was actually report to the Interstate Commerce Commission and received by them on September 2, 1913, which said report for the month of May, 1913, was received by the Interstate Commerce Com-

mission June 26, 1913, in which the name of B. G. Bishop does not appear, and which report shows thirty-nine employees having been on duty during that month for a longer period than that provided in the Act. It also appears that for some reason, presumptively innocent, and presumptively such to which no criminality attached, and which caused the lower court (folio 14), to find, was by inadvertence or mistake, the name of B. G. Bishop was omitted. A sheet containing his name, designated "supplemental report" was received by the Commission, September 2, 1913, almost one month after this action was filed. Also the deposition of one Charles H. Bates, showing that while the order of June 28, 1911, was served upon him, as the attorney in fact for the carrier, in Washington, D. C., yet the forms supposed to be served and which were to accompany the same, were not served upon him.

The record contains all the evidence introduced upon the case on which the judgment of the court was rendered (folio 27), and upon this record defendant moved the court for the entry of a

JUDGMENT IN FAVOR OF THE DEFENDANT

upon the ground and for the reason that by the facts established by the evidence in the case *no violation of law* as alleged in the Government's complaint has been established, but to the contrary the Government had failed to make out or establish its cause of action upon any count alleged.

This motion was overruled and a

JUDGMENT ENTERED AGAINST PLAINTIFF IN ERROR

for Three Thousand Dollars, and the action of the court in overruling this motion and entering said judgment is assigned as error.

POINTS AND AUTHORITIES.

1. The power of the Interstate Commerce Commission to require a periodical report concerning any matters about which the Commission is authorized by law to inquire or to keep itself informed, or which it is required to enforce, and this information respecting hours of service of railroad employees is one of the statutes which it is the duty of the Interstate Commerce Commission to enforce, is no longer open to question.

Baltimore & Ohio Ry. Co. v. I. C. C., 221 U. S. 612.

The amendment of June 18, 1910 (36 Stat. 556), created and penalized a new offense, namely, the failure of a carrier to file its monthly or periodical report of instances of over-service of employees within the time fixed by the Commission.

Northern Pacific Ry. Co. (U. S.), 213 Fed. 162, 167.
36 Cyc. 1181.

2. That portion of Section 20 authorizing the recovery of a forfeiture is penal and must be construed as penal statutes are construed, strictly.

Erbaugh v. U. S., 173 Fed. 433, 435.
U. S. v. Wiltburger, 5 Wheaton 96.
36 Cyc. 1183, 1186.

In construing penal statutes it is the province of the Legislative department to prescribe punishment for acts. The court has no power to impose a punishment not prescribed by the Legislature, and it is always safe and wise to impose no punishment until the court can say that the Legislature has in fact as well as in intent prescribed the same.

U. S. v. Wiltberger, 5 Wheaton 76, 96.
Hackfeld v. U. S., 197 U. S. 442, 450.
Sarlls v. U. S., 152 U. S. 570, 575.
U. S. v. Corbett, 215 U. S. 233, 243.
Northern Pacific Ry. Co. v. U. S., 213 Fed. (CCA) 162.

The natural apparent meaning of the terms of a statute, should always be preferred to any recondite signification, discovered only by study, ingenuity and strong desire.

Northern Pacific Ry. Co. v. U. S., 213 Fed. 162, 168.
U. S. v. 99 Diamonds, 139 Fed. 961, 964.
First National Bank v. U. S., 206 Fed. 374, 376.

The Act of June 18, 1910, under which the order of June 28, 1911, was made, was enacted for the purpose of emasculating certain litigation which the Interstate Commerce Commission had at that time pending in the Supreme Court of the United States, wherein the right to require or demand any form of report respecting over-service was denied.

Baltimore & Ohio Ry. Co. v. I. C. C., 221 U. S. 612.

The right to require reports as to over-service under the hours of service act, prior to June 18, 1910, had been denied by more than one hundred fifty-three railroads, and as a result of this act (June 18, 1910) and

the decision in the Baltimore & Ohio Ry. Co., 221 U. S. 612) these railroads signified their readiness to comply with this requirement.

25 Annual Report I. C. C., 1911, p. 83.

The legislation was enacted for the purpose of penalizing the failure to file the report, and not omitting an item or instance from a report as filed.

N. P. Ry. Co. v. U. S., 213 Fed. 162, 168.
U. S. v. Four Hundred Twenty Dollars, 162 Fed. 803, 804.
Bonnell v. Griswold, 80 N. Y. 128, 132, 133.
Pier v. Hanmore, 86 N. Y. 95, 100.
Matthews v. Patterson, 16 Col 215; 26 Pac. 812, 813.

If a report as filed is not complete, the remedy is not to punish as if no report was filed, but to subject the party making the report to a prosecution for perjury. The statute requires "such periodical or special report shall be under oath whenever the Commission so requires." The order of June 28, 1911, requires the carrier to "report within thirty days after the end of each month *under oath,* all instances where employees, subject to said act, have been on duty for a longer period than that provided in said act.

N. P. Ry. Co. v. U. S., 213 Fed. (CCA.) 162, 168.
Matthews v. Patterson, 16 Colo. 215; 26 Pac. 812, 813.

Clause 2 of the order of June 28, 1911, with respect to instructions and forms has been abolished.

See order Interstate Commerce Commission April 8, 1912.

See also folio 18, Transcript Case No. 2490. O-W. R. & N. Co. v. U. S. A. upon writ of error to the Dist-

rict Court of the United States for the District of Oregon.

The omission by a carrier from the periodical report of the instance of excessive service of its employees made and filed in good faith within the time prescribed therefor by the Interstate Commerce Commission under the amendment of Section 20 of the Act to regulate commerce (36 Stat. 556), of one or more instances that should have been included therein, or any mistake of law or fact therein made in good faith, does not subject the carrier to liability for the penalties or forfeiture denounced by that amendment for failure to file a periodical report.

Northern Pacific Ry. Co. v. U. S., 213 Fed. C. C. A. 162, 168.

ARGUMENT.

Two questions are presented for decision:

1. Can a carrier be penalized for a failure to file a report of over-service as required by an order of the Interstate Commerce Commission, where such report has actually been filed, but one or more instances, or one or more items required, are omitted, either by inadvertence, mistake or otherwise, and

2. Can a recovery of a penalty or forfeiture for the alleged violation of an order of the Interstate Commerce Commission made June 28, 1911, be sustained where a portion thereof has been abolished by the order of the Interstate Commerce Commission made April 8, 1912, and where no forms were provided by which to comply

with the order of June 28, 1911, and where the order of April 8, 1912, has not been plead?

On the 21st of April, 1913, the plaintiff in error made a report to the Interstate Commerce Commission of over-service for the month of March, 1913 (Transcript, folio 29). To this report was attached on Form 1, the oath of C. J. Sutherland, the Assistant General Manager of the plaintiff in error, and other forms required by the order of the Interstate Commerce Commission of April 8, 1912, showing a total of ninety men performing over-service for the month of March, 1913. On the 26th day of June, 1913, the plaintiff in error made its report to the Interstate Commerce Commission of the over-service for the month of May, 1913 (folio 30). This report consisted of one sheet on Form 1, containing the oath of Assistant General Manager Sutherland. To this oath, on the forms prescribed by the order of April 8, 1912, was attached information showing thirty-four employees performing over-service for the month of May, 1913. The name of operator Bishop was omitted from each of these reports. Out of one hundred twenty-four instances of over-service for the months of March and May, 1913, only one name, **that of operator Bishop was omitted, and the lower court found that the name and excessive hours of service of this employee were omitted therefrom by inadvertence or mistake (Folio 13).** It will, therefore, be seen, that a substantially accurate report was filed within the time prescribed by the order of the Commission, and we contend that the statute has been complied with; that the omission of a name or two from the report filed is not an offense, and that no penalty can legally be assessed

against the plaintiff in error under a reasonable and proper construction of the law.

In the ascertainment of a proper construction of the amendment of June 18, 1910, to Section 20 of the Commerce Act, the court, it is suggested, should recall the circumstances under which the power to make the order of June 28, 1911, was obtained. The Interstate Commerce Commission on the 3rd of March, 1908, made and entered an order requiring the carriers, subject to the Hours of Service Act, to make monthly reports, under oath, showing instances where employees, subject to that act, had been on duty for a longer period than that allowed. And on August 15, 1908, made an additional order prescribing new forms and also a separate form of oath for use in case there had been no excessive service.

(See statement of Mr. Justice Hughes in Baltimore & Ohio Ry. Co. v. I. C. C., 221 U. S. 613, 614.)

One hundred and fifty-three railroad companies, prior to this time, had failed to file the reports contemplated by this order (See 25 Annual Report of the I. C. C., 1911, p. 83); and the Baltimore & Ohio Ry. Co., filed a bill in equity in the Circuit Court of the United States for the District of Maryland to annul these orders and for injunction, stating (221 U. S. 613) among other grounds "that the Commission was without authority to make the order, either under the provisions of the act, or otherwise." (221 U. S. 616.)

In view of the history of the legislation bearing upon this question, it will be seen that the Interstate Commerce Commission was asserting the power to require these reports, and many of the railroads of the country, if not all of them, had denied the existence of this power,

and the only question at issue at that time between carriers and the Commission was whether or not such power had its foundation in law. While the case of Baltimore & Ohio Railroad Company vs. Interstate Commerce Commission, 221 U. S. 612 was pending, and prior to the decision rendered therein, Congress amended Section 20 of the act to regulate Commerce by the act of June 18, 1910. This amendment was for the purpose of lodging in the Interstate Commerce Commission the power, the possession of which by the Commission had been denied. The amendment was tacked on to the act to create the commerce court. (Chap. 309, 36 Stat. 556), and reads as follows:

"The Commission shall also have authority by general or special orders, to require said carriers, or any of them, to file monthly reports of the earnings and expenses, and to file periodical or special, or both periodical and special reports, concerning any matter about which the Commission is authorized or required by this or any other law to inquire or keep itself informed, and which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires."

The foregoing legislation clearly embraces the power which the Commission was asserting, and it, therefore, became entitled to promulgate an order requiring the periodical and special reports to be made. The effect of this legislation was to settle the legal questions with respect to the power of the Commission to require these reports and dispose of the case then pending in the Federal Supreme Court. The Interstate Commerce Commission in their 25th Annual Report for the year 1911, at page 83, said:

"As a result of this decision, one hundred fifty-three

railroad companies, which theretofore had failed to file reports, have signified their readiness to comply with this requirement."

What was this requirement, and what was it that had been denied? Clearly, it was the right to require a periodical and special report. Theretofore it had been claimed there was no law justifying such a report. For the purpose of creating the power to require the report, this amendment was passed. As a part of the same legislation, it was provided:

"And if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided."

Now, the "forfeitures last above provided" were the forfeitures to which the carriers were subjected if they failed:

(a) To file their annual reports within the time specified, or,

(b) Failed to make specific answers to any question authorized within the time limited.

And the forfeiture was "the sum of One Hundred Dollars for each and every day it shall continue to be in default with respect thereto."

Now, bearing in mind that the purpose of the legislation was to secure a periodical or special report, and that the forfeiture referred to "is for each day it shall continue to be in default with respect thereto," the question arises, what is meant by the words "default with respect thereto;" and what is meant also by the language "shall make and file any such periodical or special report." The natural and reasonable meaning of such language in the light of the history of the legislation and

of the duties of the Commission and their coveted powers, together with the fact that the exercise of these powers were being thwarted and the existence of the power denied by the carriers, is that the carrier does not subject itself to the imposition of the penalty, except it fail *to file any report whatsoever.* Of course, such report would have to be a substantial compliance with the commands of the law. It would have to be an attempt in good faith to comply therewith. It would have to contain, moreover, sufficient of the information required as to rise to the dignity of a report. If it were a make-shift and showed on its face a fraudulent mala fides attempt to comply with the statute, no court would consider such a document a report; but if, on the other hand, it did contain substantially all, measureably all, of the information required, from which a court of justice, acting through the conscience of the Chancellor, would be impressed with the idea that here is a carrier who has made every effort to comply with the law, and placed before the Commission, within the time required, a document which does rise to the dignity of a report, then we contend that such a carrier has fully complied with the law and is not amenable to the forfeiture and penalties provided, even though there has been found to be omitted from the report, as filed, a fact or figure necessary to its absolute completeness. For example, suppose in filing the annual report required by Section 20 of the Act to Regulate Commerce, in giving the number of stockholders an error was found; or in placing the cost and value of the property and the salaries were inaccurately stated, would the Interstate Commerce Commission contend that such annual report was no report,

and, therefore, a penalty should be assessed. Suppose, again the Commission had propounded a question to which they required specific answer, and the carrier in its attempt to comply, should make an answer by it deemed specific, but which, in the opinion of the Commission, was not specific, would this be deemed no answer, and would the remedy be the assessment of these penalities? Obviously not. It would be grossly unjust to so penalize. Suppose, therefore, in filing a periodical report of the instance of excessive service, there is omitted an item or two not sufficient, however, to destroy the integrity and substantiality of the report, why should it be contended that the carrier should suffer the same penalty as if no report whatever was filed, and as if plaintiff in error had taken the same position as the one hundred and fifty-three carriers did prior to the decision in the case of Baltimore & Ohio Ry. Co. vs. I. C. C., 221 U. S. 612.

It is the province of the legislative department to prescribe punishment for acts, and it is no part of the power or province of a court to impose a punishment not prescribed by the legislature.

U. S. v. Wiltberger, 5 Wheaton, 76, 96.

It has always been the rule, suggested Mr. Justice Marshall in substance, that penal laws are to be construed strictly, and this principle is as old as construction itself; it is founded on the tenderness of the law for the rights of individuals and on the plain principle that the power of punishment is not vested in the courts.

The amendment of June 18, 1910, created and penalized a new offense, viz.: the failure of a carrier to

file its monthly or periodical report of instances of excessive service of its employees within the time fixed by the Commission. This being true, the persons and acts denounced must be stated clearly and thoroughly prescribed, and

"An act which was not an offense by the express will of the legislative body before it was done, may not be justly or lawfully made so by construction after it is committed, either by the introduction into the statute of declarations or the expunging therefrom of words or terms by the judiciary."

Nor. Pac. Ry. Co. v. U. S., 213 Fed. 162, 167.

Toulmin, District Judge, in the case of United States vs. Four Hundred Twenty Dollars, 162 Federal Reporter 803, 805, quoting from a decision of the Supreme Court of the United States, said:

"The province of construction lies wholly within the domain of ambiguity."

The learned judge then quoted the words of Mr. Chief Justice Marshall in the Wiltberger case, saying:

"The intention of the Legislature is to be calculated from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

The learned District Judge was considering a provision of the Emigration Act, where the master of a vessel is required to report to the Collector of Customs further information respecting all aliens on broad, and this report was to be under oath, and said:

"We may well infer that it was because it was considered that the verification of the lists by the signature and oath of the master would be a sufficient assurance that said lists would speak the truth. . . . The violation of this oath by the master in stating matters of information in the lists which he knew to be incorrect

and untrue, or which he did not believe to be true, might subject him to severer punishment than the imposition of the penalty provided by the act under consideration, and it seems to me would be a greater assurance, if assurance were necessary, that the information furnished was correct and true in every respect, or believed to be so."

So, also in the case at bar, Congress authorized the Commission to require these reports to be made under oath. It failed to penalize the omission to furnish an item or an instance called for by the Commission, and it may well be said that Congress believed the oath to be a greater assurance than the penalties prescribed, and in view of the fact that the power to require the report in the first instance was the cause of the legislation, it is easily understood therefrom that it is the failure to file a report which is penalized, and that the completeness of the report as filed is to be secured and assured by attaching thereto an oath of the carrier's officials.

If, therefore, the statute is to be strictly construed in the first place, and that a statute which creates a new offense and prescribes its punishment, must state clearly the acts denounced, and also that the natural, apparent meaning of the terms of a statute should always be preferred to any recondite signification, discovered only by study, ingenuity and strong desire, it would seem to be a straining of the language, a giving it an unusual and unnatural meaning to make it mean that a penalty is imposed not only for failing,

(1) To file a periodical report, or a specific answer or an annual report; but also to make it include;

(2) The omission to state in a report duly filed, some item, fact or instance which the Commission be-

lieved necessary to the conduct of their official duties, and which was, as compared to the whole amount of information demanded, wholly insignificant and absolutely unimportant, or which had been omitted through inadvertence or unintentional mistake.

In the case of Bonnell v. Griswold, 80 N. Y. 128, the Court of Appeals of the State of New York, had occasion to construe a statute out of which questions analogous to the instant case were considered. By a statute of New York, corporations were required to make an annual report within a time limit, which shall state the amount of capital, the proportion actually paid in and the existing debts. The report was required to be signed by the president and a majority of its trustees, and verified by the oath of the president and secretary. A penalty was attached to the statute to the following effect:

"If any of said companies shall fail so to do, all of the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made."

In construing this statute, the Court found that a report had been in fact filed; that it complied with the statute, but was false in a material particular; it was argued that a false report was no report, and did not meet the demands of the statute. The court held the defendant in the case could not be liable for the company's debts, because it was not so declared by the statute, saying:

"The statutory liability imposed . . . does not attach if a report is made in terms complying with the statute, *although some of the representations be untrue.*"

To the same effect, see

Pier v. Handmere, 86 N. Y. 95.
Matthews v. Patterson, 26 Pac. (Col.) 812.

The case of

Northern Pacific Railway Company v. United States, 213 Federal 162

was a decision by the Circuit Court of Appeals for the Eighth Circuit, participated in by Circuit Judges Sanborn and Hook and District Judge Pope, and the opinion was unanimous. There was a prosecution of the Northern Pacific Railway Company for a failure to include in its reports, actually made, specific cases of excessive service of railroad employees. It appeared that in the month of October, 1911, an engineer, fireman, conductor and two brakemen had rendered over-service. The company had been sued by the United States for the penalty prescribed by the Hours of Service Act; recovered a judgment and the judgment was paid. On November 29, 1911, or within the time prescribed by the Commission's order, the Railroad Company filed its monthly report under oath, of instances of hours of service of its employees on duty during October for longer periods than those named in the Hours of Service Act, in the forms and in accordance with the regulations of the Interstate Commerce Commission, and many such instances were disclosed therein. The report was intended to be complete and to embrace any and all instances where its employees were kept in service longer during the month of October than the times limited by the Act of Congress, but it did not specify the instances of excessive service upon which the action was founded. The court found as a fact, that the omission was unin-

tentional, and a single instance only was omitted, and the question arose, therefore, whether or not such an omission from a report actually filed was a failure to file the periodical report required by law, which renders the company liable to the penalty of One Hundred Dollars for each successive day after the expiration of thirty days, within which the report is required to be filed.

Circuit Judge Sanborn speaking for the entire court of appeals, said (p. 165):

"The court below answered this question in the affirmative, and in support of that conclusion counsel for the government contend that the mistake of the company here was a mistake of law, and not of fact, and for the purposes of this discussion and decision this contention may be admitted to be sound. They argue that the order of the Commission required a monthly report *of all instances* of excessive service, that the filing of the report of all instances *but one* was a failure to file a report of all instances, and therefore a failure to file the periodical report which created a liability to the penalties prescribed by the act. But it is not true that a carrier that in good faith files an incorrect or incomplete periodical report, under oath, in due time, has failed to file any such periodical report. If it were, such a carrier would be liable to penalties for each of the instances of excessive service specified in such a filed report as much as for those omitted, and such a result is too intolerable and oppressive to be seriously contemplated."

The Court's opinion in this case, has been the basis of much of the argument made in this brief, and in speaking of the last clause of Section 20 of the Act to Regulate Commerce, under which this action is brought, made the following very pertinent, clear and sound observation:

"Congress might have modified this clause, which describes and limits the offense, to-wit: 'If any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided,' so that it would have read: 'And if any such carrier shall fail to make and file such periodical or special report within the time fixed by the Commission, *or shall omit to specify in any such report it files any instance of excessive service required to be reported therein,* it shall be subject to the forfeitures last above provided.' But it did not do so, the legal presumption is that it did not intend to do so, and it is not the province of the judiciary thus to amend the statute and by such amendment to create and punish another class of offenses."

And upon the whole case, the Circuit Court of Appeals for the Eighth Circuit, speaking through the learned Circuit Judge, said:

"And the conclusion is that an omission by a carrier from the periodical report of the instances of excessive service of its employees made and filed in good faith within the time prescribed therefor by the Interstate Commerce Commission under the amendment of Section 20 of the act to regulate commerce (36 Stat. 556), of one or more instances of that which should have been included therein, or any mistake of law or fact therein made in good faith, does not subject the carrier to liability for the penalties or forfeitures denounced by that amendment for the failure to file a periodical report."

It may be suggested here that the element of good faith, mistake or inadvertence is not in this case; but we contend that the presumption of law is that our acts, in attempting to comply with these statutes and orders, are each and all done in good faith, and that whatever omission is made from said report which does not diminish its substance or take from it the dignity

of a report, must be deemed to have been made inadvertently and without any desire or intention to violate the law or the orders of this Commission. And even should it not be so held, quoting from the opinion of Circuit Judge Sanborn:

"Reason and authority alike teach that the act of omitting from a periodical report filed in good faith an instance or item which should have been included therein . . . is not the offense of failing to file such periodical report."

Citing a number of very important authorities.

Nevertheless, District Judge Rudkin was of the opinion and so stated (Folio 14):

"The carrier actually . . . made reports . . for the very months during which the delinquencies complained of occurred, but the number of excessive hours of service of the employee in question were omitted therefrom by inadvertence or mistake."

Therefore, in either event whether the situation be accounted for by inadvertence or mistake, or whether we stand upon the proposition that the act of omitting an instance or an item from a filed report, is not the offense of failure to file; the result, so far as the plaintiff in error is concerned, is the same and justifies a reversal of this judgment.

The consequences of any other construction are so oppressive, so intolerable and unjust as to render it impossible for any court to believe Congress intended such a construction.

In the case at bar, operator Bishop rendered overservice during the month of March, 1913. The periodical report for that month was made April 21, 1913. The first day of default is claimed on May 1, 1913. The complaint was filed August 4, 1913; thus disclosing

one hundred and twenty-five days of default prior to the filing of the action, and by delaying the action for one year, three hundred and sixty-five days of default would occur; or in other words, there was actually $12,500 of penalties accrued prior to the filing of the action, or by delay the Commission could secure penalties of $36,500, and all this because a single instance was omitted from a very voluminous and otherwise accurately filed report. Again, if a single instance omitted justifies a penalty, then two instances would justify two penalties, and three instances, three penalties. In other words, if the construction claimed by the Government is correct, that a separate report must be made for each employee or be subjected to a penalty, then it would follow that, depending upon the circumstances and the caprice of the Commission, the penalties of One Hundred Dollars a day could be increased to two hundred and three hundred dollars per day, depending upon the number of instances omitted. Take the case of a train crew. The Court knows that the ordinary train crew consists of not less than five men, and where there is an instance of over-service of one member of a crew, there are also five instances. Would it be contended that the failure to mention the instance of this train crew rendering over-service would subject the carrier to the penalty of Five Hundred Dollars per day? This construction would lead to such preposterous absurdity and such unheard of oppression as to convince at once that Congress intended no such results.

Moreover, in the case at bar, what law exists which, if one hundred and fifty-five successive days of default exists, up to September 2d, 1913, and a pen-

alty of One hundred dollars a day is to be assessed, aggregating $15,500, justifies the Commission in placing a construction thereon which would recover only for fifteeen days of default; namely, from May 1st to May 17th, both dates inclusive and intervening Sundays excepted; what law exists which authorizes them to exclude Sundays from their respective causes of action. The answer is, there is no law except the whim of the Commission which is exercised by a clerk in the department of safety of the Interstate Commerce Commission. Can it be possible in this country of ours which prideth itself on being a government of law, that the American railroads must be subjected, not to a rule of law, but to the mere caprice or whim or desire of some clerk in the office of the Interstate Commerce Commission? Perhaps it was the oppressive character of the results of such construction contended for by the Government which prevented in this action the Government claiming penalties in the sum of $12,500 and reducing the claim to $1500. It will not be contended that the results of such construction would affect all carriers alike, and it certainly has not, and it certainly will not in the future. A carrier that happens to cross the course of the employee of the Interstate Commerce Commission and obtains his ill-will could be subjected to sufficient penalties as to seriously harrass its performance of its public duties as a carrier. On the other hand, a more fortunate carrier would be subjected to a lesser penalty. Take, for example the plaintiff in error in this case is now being subjected to penalties aggregating $6000.00; Three thousand dollars in the case at bar, and three thousand dollars in another similar

case pending in this court bearing serial No. 2490, and the possibilities in the assessment of the penalties in the two cases will aggregate Fifty Thousand Dollars if the construction contended for by the government is true. In other words, the situation is so harsh, so unjust, so oppressive and so erroneous as to be properly characterized only as like vultures soaring around and finally alighting on the carcasses of the fast expiring American railroad systems. It was even beyond the conscience of the Commerce Commission acting through its safety department to make such extravagant claims, and so the action is only for thirty penalties. The action in the Northern Pacific case, 213 Fed. 162, was for five penalties. Why has the Northern Pacific Railroad Company been sued for five penalties and the Oregon-Washington Railroad & Navigation Company for sixty penalties in two actions? The whole merely illustrates the manifest error in placing a construction of that kind upon the statute and the order in question.

It has been held that the statute with respect to the penalties, by its terms, is mandatory, and that the court cannot consider any matter in mitigation as ground for the reduction of the penalties.

U. S. v. Yazo & M. Ry. Co., 203 Fed. 169.

Therefore, by the mere omission of a single instance in the periodical report, by the failure to be as specific in answers to an authorized question, as the Commission might deem it should be, or by the misstatement in the value, or the costs, or the dividends or the number of employees in the annual report, the carrier would be exposed to penalties aggregating many thousands of dollars. The leniency of the Government in claiming less

than that to which it is legally entitled, cannot affect the true interpretation of the statute.

To affirm this case and sustain this judgment is to inevitably vest in some Government official the power to determine in advance the measure of punishment to be meeted out to a defaulting carrier, with the result that with respect to the same state of facts one carrier is sued for five days' default, another carrier for thirty days' default and another carrier for sixty days' default, depending not upon the certainty and stability of the law, but upon the will of some government official, thereby invading the province of the legislature to determine the quantum of punishment for a given act. It is not strange, therefore, that the Government hesitates to seek enforcement of such a law to its full extent, if their theory be correct, and the very injustice and oppressive character of the results of those views tend strongly to establish the contention of the plaintiff in error.

If the language will bear any other construction than that contended for by the Government, and a construction of which will relieve oppression, abolish favoritism and render the law certain, it is respectfully submitted that it should be adopted.

The conclusion must be, that the plaintiff in error has not violated Section 20 of the Act to Regulate Commerce, and has not offended against its penalty provisions.

This conclusion is in harmony with the natural and ordinary meaning of the statute and is not oppressive, nor harsh, nor unjust. It is a conclusion which may be adopted with a feeling that the law has not been made

an instrument of torture, but remedial in its nature.

Such a conclusion is earnestly prayed for in this action.

II.

The plaintiff in error contended in the lower court that it was unjust for the Government to claim a conviction for the violation of the order of June 28, 1911, for the reason that when the order was promulgated and served upon Mr. Charles H. Bates, our agent and attorney in Washington, D. C., whom we had designated as the person in that state upon whom service of orders and process could be made, no forms, such as the order required to be used, were served with it; and, therefore, the Government's case was incomplete. It would not only be unjust but immoral to prosecute for enormous penalties and forfeitures the violation of an order, when the Interstate Commerce Commission had failed and neglected to do, keep and perform one of the important conditions and requirements of the order which it had promulgated.

It was not disputed that where the order of June 28, 1911, referred to "Accompanying forms entitled 'Interstate Commerce Commission Hours of Service Reports,' " that there were no forms accompanying the service of the order, and there is no evidence that the forms were served at all. To meet this contention two propositions were urged:

First: On cross examination of Mr. Bates (Folio 22) he was required to testify that he did receive from the Interstate Commerce Commission a copy of an order, dated April 8, 1912, entitled "In the matter of alteration in the method and form of monthly reports of the Hours

of Service of employees on railroads, subject to the act of March 4, 1907," and also with said order did receive certain forms, Numbers 1 to 8 inclusive, entitled "Interstate Commerce Commission hours of service reports." It seems clear, therefore, that the method and form of making these monthly reports had been altered. The order itself so states, and if the Court takes judicial knowledge of the actions of the Interstate Commerce Commission, it must know that the order of June 28, 1911, was materially modified and in many respects abolished.

The Government offered in evidence certified copies of the Hours of Service Report of the carrier, showing hours of excess labor during the months of March and May, 1913. This exhibit will be brought up for this Court's inspection, under authority of Section 4 of Rule 14 of the Court of Appeals. An inspection of this exhibit will show the forms to be those provided by the order of April 8, 1912, notwithstanding the concessions the carrier's trial attorneys made to the Government, as shown by the Bill of Exceptions (folio 19).

Secondly, the next contention of the Government is that it was conceded by the plaintiff in error that the reports filed with the Interstate Commerce Commission by the plaintiff in error, herein, were identical forms of reports required to be used and filed by carriers under the order of the Interstate Commerce Commission of June 28, 1911 (folio 19). The lower court held that inasmuch as the carrier had received the forms by some other means that they could not be heard to say that they were not served upon Mr. Bates. It is difficult to understand why the Government relies upon this conces-

sion, when they knew that the order of June 28, 1911 was modified, altered and materially changed by the order of April 8, 1912.

Mr. Otis B. Kent, Special Assistant United States Attorney who tried this case in the court below, also cross-examined Mr. Charles H. Bates (folio 22), in which he expressly interrogated Mr. Bates concerning the receipt of the order of April 8, 1912.

Now, the Government's contention creates a serious dilemma. It is a double-headed dilemma. If the reports made by the carrier, certified copies of which were offered in evidence, were identical with the forms of reports adopted by the order of June 28, 1911, then we say the Government cannot claim a conviction because this feature of the order has been abolished by the order of April 8, 1912. On the other hand, if these forms of reports which were actually used by the carrier are in fact, notwithstanding the concessions, identical with those required by the order of April 8, 1912, then we say that the Government has not plead the provisions of the order of April 8, 1912, and consequently its violation cannot be claimed. In either event, the Government's case must fail for the very simple reason that the complaint fails to state the entire case, when it omits all reference to the order of April 8, 1912, and the exhibits in question, consisting of voluminous instances of overservice, brought together into one single report can serve no purpose in establishing liability of the carrier to the Government, but are exceedingly useful and absolutely conclusive in showing the carrier to have actually filed a report in accordance with the various orders of the Commission now in force.

We, therefore, respectfully submit that the judgment of the court below should be reversed, with directions to enter an order dismissing the complaint.

Respectfully submitted,

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